

FEB 5 1988

JOSEPH F. SPANIOLO
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IN THE
Supreme Court of the United States
 OCTOBER TERM, 1987

KOCH REFINING COMPANY, KOCH FUELS, INC.,
 CONOCO INC., MOBIL OIL CORPORATION,
 CHEVRON U.S.A. INC., AND TENNECO OIL COMPANY,
Petitioners,
 v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
 PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
 INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
 INCORPORATED, MFA OIL COMPANY, TENNESSEE FARM-
 ERS COOPERATIVE, MOORE MCCORMACK PETROLEUM,
 INC., GULF STATES OIL & REFINING COMPANY, TEXACO,
 INC., and GETTY REFINING AND MARKETING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
 United States Court of Appeals
 for the Seventh Circuit

BRIEF OF RESPONDENTS
 FARMERS UNION CENTRAL EXCHANGE, INC.,
 FARMERS PETROLEUM COOPERATIVE, INC.,
 LANDMARK, INC., LAND O'LAKES, INC.,
 MIDLAND COOPERATIVES, INCORPORATED,
 MFA OIL COMPANY, AND
 TENNESSEE FARMERS COOPERATIVE
 IN OPPOSITION

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February 4, 1988

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QUESTION PRESENTED

Whether the court of appeals correctly held that, as a matter of state law, the trustee in bankruptcy was permitted to bring a claim to hold the owners of the corporate debtor liable for breach of fiduciary duty and thereby to pierce the corporate veil, pursuant to the trustee's obligation under 11 U.S.C. § 541 to recover all "property" of the estate.

RULE 28.1 DISCLOSURE

The listing, pursuant to Supreme Court Rule 28.1, of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of these respondents is contained in the appendix to this brief.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1141

KOCH REFINING COMPANY, KOCH FUELS, INC.,
CONOCO INC., MOBIL OIL CORPORATION,
CHEVRON U.S.A. INC., AND TENNECO OIL COMPANY,
Petitioners,

v.

FARMERS UNION CENTRAL EXCHANGE, INC., FARMERS
PETROLEUM COOPERATIVE, INC., FCX, INC., LANDMARK,
INC., LAND O'LAKES, INC., MIDLAND COOPERATIVES,
INCORPORATED, MFA OIL COMPANY, TENNESSEE FARM-
ERS COOPERATIVE, MOORE MCCORMACK PETROLEUM,
INC., GULF STATES OIL & REFINING COMPANY, TEXACO,
INC., and GETTY REFINING AND MARKETING COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF RESPONDENTS
FARMERS UNION CENTRAL EXCHANGE, INC.,
FARMERS PETROLEUM COOPERATIVE, INC.,
LANDMARK, INC., LAND O'LAKES, INC.,
MIDLAND COOPERATIVES, INCORPORATED,
MFA OIL COMPANY, AND
TENNESSEE FARMERS COOPERATIVE
IN OPPOSITION

Farmers Union Central Exchange, Inc., Farmers Petroleum Cooperative, Inc., Landmark, Inc., Land O'Lakes, Inc., Midland Cooperatives, Incorporated, MFA Oil Company, and Tennessee Farmers Cooperative ("respondents") hereby oppose the petition for a writ of certiorari filed in this case.

STATEMENT

1. Respondents are agricultural cooperatives that in 1976 formed Energy Cooperative, Inc. ("ECI"), an oil refining company, to ensure a steady supply of petroleum products to their members. Pet. App. A2. Respondents own 100 percent of ECI's stock and are its principal customers. Petitioners are oil refiners, distributors and marketers who sold petroleum products to ECI. *Id.*

In May 1981, ECI filed a voluntary petition for reorganization under Chapter 11 of the Bankruptcy Code. Thereafter, ECI, as debtor in possession, filed suit against petitioners to recover alleged preferences under Section 547 of the Bankruptcy Code, 11 U.S.C. § 547; Pet. App. A3. The complaints in the preference litigation alleged that ECI transferred money or property to petitioners on account of antecedent debts within 90 days of bankruptcy and at times when ECI was insolvent. *Id.* If the preference litigation is successful, ECI stands to recover nearly \$50 million allegedly received by petitioners during the relevant period. *Id.*

ECI also has filed a lawsuit against respondents "in an attempt to hold them liable for all of ECI's debts." Pet. App. A2. ECI's suit against respondents alleges that they breached contracts with ECI, that they breached certain fiduciary duties to ECI and that they "should be liable for all of ECI's debts as its 'alter ego' under a 'piercing the corporate veil' theory." *Id.* at A3.¹

¹ In December, 1983, a group of ECI's creditors sought to intervene in the litigation between ECI and respondents to assert the

In May, 1984, ECI converted its Chapter 11 reorganization case to a Chapter 7 liquidation case. A trustee was appointed who is now pursuing both ECI's preference litigation against petitioners and ECI's claims against respondents. Pet. App. A3.

2. In July, 1985, petitioners filed the present action against respondents in the United States District Court for the Northern District of Illinois. Petitioners made essentially the "same" allegations (Pet. App. B2, A3) as those being litigated by the trustee, on behalf of ECI, viz., respondents "manipulat[ed]" and "misuse[d]" ECI and are thereby liable (as ECI's "alter ego") for all of ECI's debts. Pet. App. A21, B3. Petitioners sought a declaratory judgment that

ECI is the "alter ego" of [respondents]; that [respondents] are jointly and severally liable for ECI's debts; that ECI was solvent when it filed its bankruptcy petitions; and that [petitioners] are entitled to recover from [respondents] all amounts that the bankruptcy trustee may recover from [petitioners] as preferences.

Pet. App. A3. Respondents filed a motion to dismiss the complaint on the grounds that the petitioners lacked standing, that the complaint failed to state a claim upon which relief could be granted and that the claim was not ripe for adjudication by petitioners. Pet. App. B2, A3.

The district court dismissed petitioners' complaint. The court noted first that petitioners' claim of standing rested on a "speculative" assertion of injury. The court described petitioners' argument regarding injury as alleging that: (1) if petitioners had not misused ECI's

"alter ego" claim, in their own names and on behalf of all ECI creditors, against respondents and to hold respondents liable for ECI's debts. The district court dismissed this claim on the ground that the claim "properly belongs to and should be prosecuted by the trustee rather than the intervening plaintiffs." *In re Energy Co-op., Inc.*, 58 B.R. 132, 134-135 (N.D. Ill. 1984).

corporate form and treated it as their "alter ego," then (2) ECI would not have become insolvent, and (3) respondents would not have been sued in the bankruptcy preference actions and (4) petitioners would not "face the possibility of becoming creditors of ECI." Pet. App. B3. The district court held, however, that "[s]tatus as a creditor or a potential creditor is not enough to confer standing upon the plaintiffs." *Id.*

In addition, the court observed that petitioners failed to satisfy the prudential element of standing that "requires that a plaintiff be the proper party to assert the particular legal issue." *Id.* (citing *Singleton v. Wulff*, 428 U.S. 106, 112 (1976)). The court determined that "the proper party to bring suit against directors and stockholders of a bankrupt corporation [i.e., respondents] . . . is the trustee of the estate." Pet. App. B3.

3. The court of appeals affirmed both holdings of the district court. Pet. App. A3-A4. The court of appeals concluded that petitioners had not alleged a sufficient injury traceable to the conduct of the respondents to satisfy the requirements of Article III and that, as a prudential matter, petitioners were not the proper proponents of the rights that they had asserted. Pet. App. A3-A4, A28.²

With respect to the Article III standing of petitioners, the court of appeals first held that the allegation of injury in fact based on the pending preference litigation was merely "conjectural." Furthermore, the court noted that "[petitioners] have not shown a direct injury to themselves as a result of challenged conduct of the [respondents]" because "[t]he harm contemplated by the [petitioners] might come from the ECI trustee but not from [respondents]." Pet. App. A30. In sum, the court

² Judge Cudahy concurred in the result, but dissented from the holding that petitioners failed to meet the minimal constitutional requirements for standing. Pet. App. A31-A32.

of appeals held that the present lawsuit was nothing more than an attempt to have the district court issue an "advisory opinion" on the ultimate outcome of the preferential transfer litigation. Pet. App. A30-A31. Because of the lack of injury in fact to petitioners and the absence of any "adverse legal interests" between the parties to the case, the court concluded that petitioners lacked standing. Pet. App. A4, A31.

The court of appeals also addressed at length the district court's holding, under the prudential standing doctrine, that the trustee—and not the petitioners—was the proper party to bring the claim against respondents. The court noted first that under 11 U.S.C. § 541, the trustee may sue to recover the "property" of the estate, including any valid claims against "directors and shareholders of a corporation for breaches of fiduciary duties" that the corporation could bring if it were solvent. Pet. App. A8-A9. Because "[s]tate law determines whether property is an asset of the debtor," (Pet. App. A8, A11, A19) the court of appeals examined the law of Indiana and Illinois³ to determine whether the claim in question—seeking to "pierce the corporate veil" and to hold respondents liable for ECI's debts—is a claim of the estate or whether such a claim belonged exclusively to ECI's creditors. After careful examination of this state law question, the court of appeals concluded that, under governing state law, the claim could properly be brought by the trustee to recover the property of the debtor, ECI. Pet. App. A13-A14. Thus, the court concluded that the district court was correct that the trustee "is the proper party to enforce fiduciary obligations 'for the protection of the entire community of interests in the corporation—

³ The court did not need to decide whether Indiana law or Illinois law applied because it found no material difference between them on this issue. Pet. App. A11.

creditors as well as stockholders.' " Pet. App. A25 (quoting *Pepper v. Litton*, 308 U.S. 295, 307 (1939)).⁴

ARGUMENT

The decision of the court of appeals is a correct application of settled principles of law to the facts of this case. Moreover, the only question of law which petitioners ask this Court to review is actually dictum; the resolution of that issue would have no effect on the judgment below. Finally, resolution of the question presented turns on an interpretation of state law. Accordingly, review by this Court of the judgment of the court of appeals is wholly unwarranted.

1. The opinion below carefully distinguishes the two alternative and entirely independent holdings affirming the district court's dismissal of the petitioners' claim. First, the court held that petitioners lacked Article III standing. Second, the court held that, as a prudential matter, the trustee in bankruptcy had the authority and was the proper party to bring the claim in question against the respondents.

Petitioners seek review in this Court of only one discrete portion of the latter holding of the court of appeals. The question presented by petitioners is whether "the Bankruptcy Code authorize[s] the trustee of a corporate debtor to prosecute an action to pierce the corporate veil" Pet., i.⁵ But, even if petitioners were to pre-

⁴ The court stated that it did not intend to determine conclusively in which capacity (*i.e.*, as a representative of the debtor or creditors) the trustee could bring suit. Pet. App. A13, n.7. That question "depends upon the circumstances of the case." *Id.* Thus, the court expressly limited its holding to the conclusion that the trustee was "not precluded from maintaining an alter ego action under Indiana and Illinois law." *Id.*

⁵ This Court reviews "[o]nly the questions set forth in the petition or fairly included therein" Supreme Court Rule 21.1(a); see *Irvine v. California*, 347 U.S. 128, 129 (1954); *Mazer v. Stein*,

vail on that issue, the judgment below would not be affected. The court of appeals' independent determination that petitioners lacked Article III standing would be wholly unaffected by a reversal on the questions presented in the petition. Moreover, it is plain that the court of appeals' holding concerning petitioners' "injury in fact" is wholly fact-specific and therefore does not warrant review by this Court. This no doubt explains petitioners' decision not to raise that issue in the petition. In short, this case is an inappropriate vehicle for resolving the question presented and, therefore, the petition for certiorari should be denied.⁶

2. The question of whether the trustee has authority to pursue the claim against respondents depends upon a question of state law not worthy of review by this Court. The court of appeals made it clear that the question of whether the "alter ego claim" could be brought by the trustee, under 11 U.S.C. § 541, turned on whether the claim was the "property" of the estate as a matter of state law. Pet. App. A11. The court's decision that the claim belonged to the estate, and thus to the trustee, rested solely on its analysis of the laws of Indiana and Illinois. Pet. App. A11-A14.⁷

347 U.S. 201, 206 n.5 (1954); *Phillips Co. v. Dumas School District*, 361 U.S. 376, 386 n.12 (1960). The question of petitioners' Article III standing is not "fairly included" in the Questions Presented, which relate solely to the authority of the trustee.

⁶ As its opinions have stated many times, this Court sits to review judgments, not simply to correct errors in opinions. See, e.g., *Bowen v. American Hospital Association*, 106 S. Ct. 2101, 2112 n.11 (1986); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1956); *Williams v. Norris*, 25 U.S. (12 Wheat.) 117, 120 (1827).

⁷ Obviously, this Court will not undertake to review judgments that rest on interpretation of state law. See *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Thus, petitioners' assertion that a "conflict" exists between the courts of appeals on this issue is mistaken. The difference in result in the various courts of appeals merely reflects differences in the state laws at issue. *In re Ozark Restaurant Equipment Co., Inc.*, 816 F.2d 1222 (8th Cir.), *cert. denied*, 108 S. Ct. 147 (1987), relied on by petitioners (Pet. 15-16) as demonstrating the most direct conflict, expressly relied on an interpretation of Arkansas law in concluding that a claim to "pierce the corporate veil" does "not become property of the estate under Section 541(a)(1)." 816 F.2d at 1225. Indeed, the court in *Ozark Restaurant* distinguished the decision of the district court below, see note 1, *supra*, as follows:-

some states permit the corporation or its shareholders to assert an alter ego cause of action to pierce the corporate veil, and thus, . . . a bankruptcy trustee would be able to enforce the claim on behalf of the debtor corporation under Sections 541 and 704. . . . Arkansas, however, is not one of those states

816 F.2d at 1226, n.7. In short, petitioners' "conflict" is illusory.⁸

Petitioners also discern a "theoretical split" between the Fifth Circuit which, according to petitioners, held "that an 'alter ego' action is property of the debtor estate . . ." (Pet. 14) and the Seventh Circuit which "finds that an 'alter ego' action is *not* property of the debtor estate by operation of state law . . ." Pet. 15

⁸ The Petition for a Writ of Certiorari in the *Ozark Restaurant* case argued that the case warranted review by this Court because of the same alleged "conflict" in the Circuits that is now being raised by petitioners. See Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit, *In re Ozark Restaurant Equipment Co., Inc.*, No. 87-71 (July 13, 1987).

(emphasis added).⁹ Petitioners' characterization of the Seventh Circuit's "finding" flatly is contradicted by the language of the opinion which states:

[w]e now find that, under Illinois and Indiana law as well [as Wisconsin law], a bankruptcy trustee can bring an alter ego claim of action. State law permits the alter ego claim to be asserted by the trustee in pursuing all funds available as section 541 property of the estate.

Pet. App. A13-14. The statement by petitioners that the Seventh Circuit relied on "the preemptive effect of the Bankruptcy Code" rather than state law is simply erroneous. In fact, the holding below turns *solely* on an issue of state law. There is no conflict in the circuits which warrants review by this Court.

3. Finally, petitioners assert that the decision below conflicts with this Court's decision in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), which, according to petitioners, held that a trustee in bankruptcy has "no authority to assert claims against third parties on behalf of creditors." Pet. 7. But, this Court's opinion in *Caplin* is considerably narrower than petitioners suggest.

In *Caplin*, this Court held that a bankruptcy trustee could not sue an indenture trustee on behalf of debenture holders—a limited class of creditors—for allowing the debtor to breach its obligations under the indenture agreement. 406 U.S. 420-421. The Court noted two problems with the claim in *Caplin* that are not present here. First, the trustee in *Caplin* was not attempting to collect money for the estate; rather, the trustee was merely seeking a recovery that would be paid directly to a lim-

⁹ The Fifth Circuit case upon which petitioners rely, *In re S.I. Acquisition, Inc.*, held that, under Texas law, "a corporation may pierce its own corporate veil and hold accountable those who have misused the corporation" 817 F.2d 1142, 1152 (5th Cir. 1987).

ited class of creditors.¹⁰ The ECI trustee, by contrast, is suing to recover money for the estate, which would be distributed to all creditors. Second, the trustee in *Caplin* was not arguing that the third party had breached any duty owed to the estate; rather, he was complaining that the third party had breached its duty to the debenture holders. In the instant case, the trustee is seeking to recover based on alleged breaches of duties owed to the corporation—a matter which is clearly within the scope of the trustee's authority. See *Pepper v. Litton*, 308 U.S. 295, 307 (1939) (“fiduciary obligation . . . is, in the event of bankruptcy of the corporation, enforceable by the trustee”).

Thus, the decision in *Caplin* prevents a bankruptcy trustee from pressing claims against third parties on behalf of a limited class of creditors, where those claims are personal to the class of creditors. There is no conflict between *Caplin* and the instant case, where the trustee is pursuing a claim against third parties on behalf of the debtor corporation, where the claim belongs to the estate itself, and where the claim, if successful, will benefit all of the creditors of the debtor corporation.¹¹

¹⁰ It was argued that any money recovered would eventually inure to the benefit of the estate because it would reduce the claims of one class of creditors, the debenture holders. However, this Court pointed out that such was not the case because in the event the trustee recovered money from the indenture trustee on behalf of the debenture holders, the indenture trustee likely would be entitled to be subrogated to the claims of the debenture holders against the estate. 406 U.S. at 430-31. Thus, such an action—unlike the claim in question here—would result in no ultimate benefit to the estate.

¹¹ Petitioners' “due process” claim is without merit. It presumes that petitioners, as *potential* creditors of the debtor corporation, are entitled to “representation” in the trustee's litigation to ensure collection of all available assets of the debtor corporation. Petitioners cite no authority for this novel proposition and none exists.

In fact, it is difficult to discern the basis for petitioners' contention that they have been deprived of “property.” The claim in ques-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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tion involves the property of the estate, and not the petitioners. Moreover, there is no "conflict" between the trustee filing a claim against a third party and the petitioners' "interest" in that claim because any recovery by the trustee would work to the benefit of all creditors, including petitioners (if, in fact, they become creditors). As the court of appeals explained, if petitioners become creditors, they will then have available all of the rights of creditors under the Bankruptcy Code. Pet. App. A26, n.14. Thus, if and when the petitioners have "property" interests at stake, they will have more than adequate procedural protections available to satisfy the Due Process Clause. In the meantime, their claim is unripe and they lack standing to assert it.

APPENDIX

APPENDIX

BEST AVAILABLE

APPENDIX

Pursuant to Supreme Court Rule 28.1, these respondents hereby submit the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each respondent. For purposes of this listing, the term "affiliate" is defined broadly, and some of the companies listed herein may or may not be regarded as affiliates under particular statutes or definitions.

Farmers Union Central Exchange, Inc.

CENEX Agri-Fuels, Co.
CENEX/Land O'Lakes Agronomy Company
Insurance Acquisition Corporation
National Cooperative Refinery Association
CF Industries, Inc.
Universal Cooperatives, Inc.
Soil Teq, Inc.
Green Bay Terminal Corporation
St. Paul Bank for Cooperatives
Ag Agency, Inc.
CENEX Foundation
CENEX/Land O'Lakes Ag Services Joint Venture

Farmers Petroleum Cooperative, Inc.

Michigan Farm Bureau
Farmers Crude Production Co.
Michigan Farm Bureau Group Purchasing, Inc.
Michigan Agricultural Cooperative Marketing
Association, Inc.
Corporate Services, Inc.
Farm Bureau Life Insurance Company of Michigan
Farm Bureau Mutual Insurance Company of
Michigan
Farm Bureau General Insurance Company of
Michigan

FB Annuity Company
Farm Bureau Marketing Corporation of Michigan
Community Service Acceptance Company

Landmark, Inc.

Countrysmark, Incorporated
Mid States Terminals, Inc.
Farmers Commodities Service, Inc.

Land O'Lakes, Inc.

Ag Processing, Inc.
CF Industries, Inc.
Cooperative Research Farm
Farm Credit Banks of Omaha
Farm Credit Leasing Services Corporation
Farm Credit Services, St. Paul
Imperial Packaging Company
Mid America Farmlines
Mississippi Chemical
Mutual Service Inc.
National Cooperative Refinery Association
Tradevest Incorporated
Universal Cooperatives, Inc.
CENEX/Land O'Lakes Agronomy Company

Midland Cooperatives, Incorporated

On January 1, 1982, Midland Cooperatives, Inc. was merged into Land O'Lakes, Inc. See the above Rule 28.1 listing for Land O'Lakes, Inc.

MFA Oil Company

National Cooperative Refinery Association
Imperial Incorporated

Tennessee Farmers Cooperative

CF Industries, Inc.
Cooperative Seeds, Inc.
Red Panther Chemical Co.
Universal Cooperatives, Inc.
FFR Cooperative
Louisville Bank for Cooperatives
American Institute of Cooperation
National Council of Farmers Cooperatives
Tennessee Council of Cooperatives